Unpicking a quarrel

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The best way of avoiding disputes is to think about resolution procedures at the outset of the contract, argues Laurence Cobb

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As parties put together a contract, they may wish to include provisions for formal dispute resolution processes such as litigation, arbitration and adjudication. Adjudication is perhaps the best known of these methods for resolving construction disputes in the UK since its statutory introduction by the Housing Grants, Construction and Regeneration Act 1996 , though like litigation and arbitration it involves the determination of a dispute by a third party who makes a binding, albeit temporary, decision on the parties.

Other forms of dispute resolution include mediation, conciliation and dispute review boards ? where non-binding decisions are recommended to the parties ? although there are also less commonly used forms such as expert determination or the court settlement process.

Commercial contracts, and construction contracts in particular, can often include escalation provisions requiring that the parties first negotiate in good faith before going to adjudication or arbitration. Other contracts, for example the New Engineering Contract, adopt early warning procedures to try to resolve conflicts before they develop into significant disputes.

Know your contract

For contract administrators, the first practical step to take towards avoiding disputes is to know your contract. This not only involves checking the dispute resolution provisions, but ensuring the following as well:

- that time limits for submitting payment or default notices are noted, and diarised if necessary
- that records are maintained clearly
- that risk registers are updated where appropriate
- that good project management and communication practices are adopted.

In addition, all elements of the contract should be kept together so that they can be readily retrieved in their entirety.

For contract negotiators, letters of intent should be used carefully and drafted appropriately, being superseded by the requisite signed contract as soon as possible. Disputes over whether certain terms form part of the contract are best avoided if possible.

Parties should also make sure that the dispute resolution provisions are considered early so those chosen are appropriate for the particular contract. Relations between the parties may always sour, even when they have worked together successfully on projects in the past or

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have already established a good working relationship.

For example, the contractor?s representative on a hydroelectric power plant in Scotland described the employer as 'the best with whom he had worked' and had established a good working relationship from the outset, providing weekly and monthly reports on technical issues. However, this still did not prevent the parties becoming involved in a ?130m dispute (SSE Generation v Hochtief [2016] CSOH 177).

Another practical tip is to ensure that dispute resolution provisions in any subcontracts contain similar provisions for resolving disputes as the main contract, since it is far easier and cheaper for disputes to be dealt with in the same forum rather than run the risk of having conflicting provisions in related contracts.

Avoiding conflicts

As already indicated, there are a number of methods for resolving disputes, and further detail can be found in the RICS Conflict avoidance and dispute resolution in construction, 1st edition guidance note.

In recent years, though, there has been much more emphasis on collaboration between the parties and on attempts to deal with disputes early as efficiently and economically as possible, rather than embark on an adversarial dispute once the contract is complete.

For large projects, bespoke dispute resolution provisions could be adopted, such as those adopted by Transport for London (TfL) in the Crossrail project contracts. The Conflict Avoidance Panel (CAP)?s provisions in TfL?s contracts are intended to be less adversarial than adjudication: the CAP consists of between one and three people who can be appointed at short notice when issues arise, and whose role is to produce a non-binding recommendation within 21 days of the appointment.

The parties are not obliged to accept that recommendation, but if it is followed then it should provide impartial guidance, which should then help the parties avoid the need for formal resolution of the issue. By not being a standing panel, the CAP differs from the dispute adjudication boards under International Federation of Consulting Engineers (FIDIC) contracts, or indeed dispute review boards, which are usually convened at a project?s start.

Dispute boards

Where a dispute review board can make a non-binding recommendation, a dispute adjudication board can issue a formally binding decision. Both boards operate in a similar way: the members visit the site periodically to acquaint themselves with the project, and meet regularly to hear about its progress and any disputes that have arisen.

The board sits on all disputes that might arise on the same project, and as the parties will become familiar with the way the board members view particular issues, that knowledge will help them when they are seeking to prevent disputes that might be brewing. Nevertheless, maintaining such a board throughout the project is an expense that can only be justified on major projects.

It should be noted that the FIDIC standard forms of contract are currently under review and are likely to recommend that dispute avoidance plays an increased role in the resolution of disputes, to encourage parties to give early notice of a potential problem and adopt a more

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collaborative approach to sharing risks.

Dispute resolution advisor

Another technique that has been adopted in international projects is the use of a dispute resolution advisor (DRA). They are appointed by the parties at the outset of the project and use mediation techniques to help resolve disputes. The DRA makes no recommendation or binding decision, but they can get involved before a dispute has crystallised, with the aim of helping the parties agree how to resolve differences between them.

Of course, negotiation between the parties is always available as an option to settle a dispute, should they be able to agree, regardless of what the contract provides; a mediator can also be appointed to help the parties with any such negotiations.

Pre-action Protocol

That parties often need help in resolving disputes can also be seen in the recently revised T echnology and Construction Court Pre-action Protocol for construction and engineering disputes .

Although following the revised protocol is optional, one of its aims is that the parties take appropriate steps to resolve their dispute without resorting to litigation by considering alternative approaches. The revised version of the protocol also introduces the concept of a referee procedure, which is designed to assist the parties in compliance.

A range of alternatives

This article has outlined some approaches to dispute resolution and looked at the opportunity to consider, at the outset of a project, mechanisms that can be used to resolve matters by dealing with disputes as amicably and economically as possible.

Experience shows that such provisions are among the least commonly read in a contract, and looking at them only after a dispute arises at best means disappointment and at worst a very painful and expensive adventure.

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Further information

- Related competencies include Conflict avoidance, management and dispute resolution procedures
- This feature is taken from the RICS *Building control journal* (April/May 2017)

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